

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

REPLY COMMENTS OF ARBITRON INC.

Arbitron Inc. ("Arbitron") hereby submits these reply comments in response to the Notice of Proposed Rulemaking ("NPRM") on proposed revisions to the Federal Communication Commission's ("FCC" or "Commission") rules implementing the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The FCC's goal to harmonize its telemarketing rules under the TCPA with the Telemarketing Sales Rule issued by the Federal Trade Commission ("FTC") is understandable. As Arbitron explained, however, the FCC's proposed rule for autodialed calls goes far beyond the FTC's Telemarketing Sales Rule, which (1) applies only to telemarketing, and (2) requires signed written consent only for telemarketing calls that deliver a "prerecorded message."¹ The Telemarketing Sales Rule does not impose any delivery restrictions on the use of autodialers to place a call (apart from its provisions relating to the allowable level of call abandonment), and the TCPA itself only requires a caller using an autodialer to call a cell phone to obtain the "express consent" of the called party.² Arbitron also pointed out the costs that the proposed rule would impose on survey research without providing additional protection to consumers. Finally, Arbitron suggested that if the FCC adopts its proposed rule, it should exempt survey research. The comments filed in response to the NPRM support Arbitron's positions.

¹ 16 C.F.R. § 310.4(b)(1)(v)(A)(iv).

Many commenters agree with Arbitron that the NPRM's proposal to require prior written consent for all autodialed calls to cell phones goes beyond FTC rules by requiring prior written consent for *all* autodialed calls to cell phones, even when the calls do not involve telemarketing, and therefore is not necessary for harmonization with the FTC's telemarketing rules.³ For example, SoundBite Communications, Inc. noted that "the FTC's rules do not apply to autodialed . . . calls to wireless phones. The goal of harmonization requires no change to existing FCC rules on such calls."⁴ DirecTV, Inc. ("DirecTV") also "strongly urges the Commission to ensure that any changes to its rules do not create new inconsistencies with the FTC's rules."⁵

Further, other commenters agree with Arbitron that the Commission has no record to support a change in the autodialer rules.⁶ The comments overwhelmingly *support* retaining the ability of a caller to use an autodialer to call a cell phone when the consumer has provided his or her number to a company or organization,⁷ and they note that the Commission has provided no basis for a change. For example, DirecTV noted that a written consent requirement applying to all automatically dialed calls to cell phones would "be inconsistent with the Commission's ruling that automated, non-telemarketing calls to wireless telephones are permissible under Section

² 47 U.S.C. 227(b)(1)(A).

³ Comments of ACA International at 36, CG Docket No. 02-278 (filed May 21, 2010) ("ACA Comments").

⁴ Comments of SoundBite Communications, Inc. at 2, CG Docket No. 02-278 (filed May 21, 2010) ("SoundBite Comments").

⁵ Comments of DirecTV, Inc. at 1, CG Docket No. 02-278 (filed May 21, 2010) ("DirecTV Comments").

⁶ See, e.g., Comments of Arbitron at 7, CG Docket No. 02-278 (filed May 21, 2010) ("Arbitron Comments"); Comments of the American Teleservices Association at 7, 9-10 CG Docket No. 02-278 (filed May 21, 2010) ("ATA Comments"); .

⁷ See, e.g., DirecTV Comments at 3; ATA Comments at 9-10; Comments of JPMorgan Chase & Co. at 3-4, CG Docket No. 02-278 (filed May 21, 2010); Comments of the National Association of Mutual Insurance Companies at 7, CG Docket No. 02-278 (filed May 21, 2010); Comments of the National Association of Mutual Insurance Companies at 7, CG Docket No. 02-278 (filed May 21, 2010).

227(b)(1)(A) where the consumer has provided his or her wireless number to a business.”⁸

Moreover, as many commenters note, the FTC record similarly supports allowing autodialed calls to cell phones that are *not* made for telemarketing purposes.⁹ Without a record explaining why the current standard does not work and supporting a change, it appears that the proposed modification is based solely on convenience, introduced because the two provisions of the TCPA contain nearly identical wording.¹⁰

The comments also share Arbitron’s concern that the proposed signed writing requirement for all autodialed calls to cell phones, including non-telemarketing calls, would impose significant costs on businesses, and on survey research in particular.¹¹ As Arbitron pointed out in its initial comments, one in four households now use only a cell phone.¹² The Marketing Research Association (“MRA”) noted that households with only a cell phone are more likely to be “younger, include more renters, consist of a higher proportion of non-Whites, and have lower income as compared to the U.S. landline population.”¹³ Requiring survey research companies to obtain a potential survey respondent’s signed written consent in order to be able to use an autodialer to call him or her would place an obstacle in the way of the participation of these households. The result would be a potential for bias in survey results

⁸ DirectTV Comments at 2-4.

⁹ See, e.g., SoundBite Comments at 2-4; Arbitron Comments at 5-7; Comments of Wells Fargo & Co. at 3, CG Docket No. 02-278 (filed May 21, 2010); Telemarketing Sales Rule, 71 Fed. Reg. 58,716, 58,720-23 (Oct. 4, 2006) (finding that “consumers expressed appreciation for prerecorded informational messages” from businesses with which they had a relationship).

¹⁰ Arbitron Comments at 7.

¹¹ See *id.* at 9-15; ATA Comments at 8 (specifically discussing the impact of the proposed rule on public opinion polling).

¹² *Id.* at 10 (citing Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2009 (2010), at 1, <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.pdf>; Arbitron, Inc., *Cell-Phone-Only Household Penetration in Arbitron Radio Metro Areas: Homes with cell phone service but without traditional landline service – Fall 2009* (2010), http://www.arbitron.com/downloads/cell_phone_penetration_map.pdf).

¹³ Comments of the Marketing Research Association at 6-7, CG Docket No. 02-278 (filed May 21, 2010).

because the populations represented by these households would be underrepresented. As the American Teleservices Association (“ATA”) explained, specifically with regard to public opinion polling and irrespective of telemarketing:

ATA members engaged in public opinion polling and research voice significant concerns regarding their prospective inability to contact individuals by telephone for scientific polling and research purposes. As cell phone use proliferates, research firms will be unable to contact an enormous block of individuals for polling purposes, thereby significantly reducing the accuracy of data samples and the reliability of opinion polls. This will have significant detrimental effects on businesses as they seek to determine market conditions for the introduction of products and services, and the maintenance of existing products and services.¹⁴

Telephone survey research covers such critical issues as political polling, unemployment measures, health care access, and health indicators.¹⁵ As the MRA notes, “[i]t is unlikely that these populations [which represent higher numbers of cell-phone households] would wish to be disenfranchised from research studies.”¹⁶

A study by the Pew Research Center for the People & the Press (“Pew Research Center”), released after the Commission’s deadline for initial comments, further documents the importance of lowering, rather than raising, barriers to conducting surveys of cell-phone households.¹⁷ The Pew Study found a small but significant bias in survey research that excludes households that rely exclusively or primarily on cell phones.¹⁸ Because of the different demographics of cell-phone households, cell-phone-only respondents held different views on politics and social issues, in addition to a slightly different relationship with technology. For example, landline users

¹⁴ ATA Comments at 8.

¹⁵ *Id.* at 7.

¹⁶ MRA Comments at 7.

¹⁷ Leah Christian et al., The Pew Research Center For The People & The Press, Assessing the Cell Phone Challenge to Survey Research in 2010 (2010), <http://pewresearch.org/assets/pdf/1601-cell-phone.pdf>. A copy of the Pew Study is attached.

¹⁸ *Id.* at 3-4.

reflect *higher* rates of Internet usage – specifically broadband usage – but lower rates of wireless Internet use.¹⁹ Thus, surveys that do not adequately represent cell-phone households could *overestimate* broadband Internet usage, a key issue for the FCC. As the Pew Study notes, Arbitron and other survey research companies have attempted to mitigate the difficulties in reaching cell-phone households through address-based sampling.²⁰ However, the proposed rule requiring signed consent will have a significant and negative impact on these endeavors by creating obstacles to participation by members of cell-phone households.

Other commenters supported Arbitron’s position that the likely harms to survey research that would result from the Commission’s adoption of the proposed rule would not be counterbalanced by any real benefit to consumers.²¹ As many commenters note, there is no need for this new rule.²² Consumers are adequately protected by the current rules regarding calls to cell phones.²³ And, “by providing their wireless telephone number as their primary point of contact, people expect to receive information and business communications at that number without having to provide additional consent.”²⁴ In fact, as the FTC has found, and as many commenters in this proceeding note, most consumers want and expect such calls.²⁵

¹⁹ *Id.* at 10.

²⁰ *Id.* at 15-16. Address-based sampling selects participants at random based on address, rather than the random-digit-dial method traditionally used.

²¹ See Arbitron Comments at 9-15; DirecTV Comments at 3; SoundBite Comments at 3, 9.

²² See, e.g., Arbitron Comments at 13-15; ATA Comments at 8, 10-11; Soundbite Comments at 7-9, 11.

²³ Arbitron Comments at 13-15 (citing Thomas J. Sugrue, Federal Communications Commission, Fifth Annual CMRS Competition Report: Thomas J. Sugrue Opening Remarks at 8 (Aug. 3, 2000), http://wireless.fcc.gov/statements/Sugrue_slides3.ppt) (In addition to consumer consent for these calls, the costs to consumers of incoming cell phone calls has dramatically decreased since Congress adopted the TCPA in 1991, from approximately 45 cents per minute in 1991 to approximately 5 cents per minute in 2008—or no cost, for those consumers with “bucket” or unlimited calling plans).

²⁴ DirecTV Comments at 3.

²⁵ SoundBite Comments at 3 (citing Telemarketing Sales Rule, 71 Fed. Reg. 58,716, 58,720 (Oct. 4, 2006)) (noting that “consumers expressed appreciation for prerecorded informational messages” from businesses with which they had a relationship); see also DirecTV Comments at 2-3; ATA Comments at 9-11.

It is important to remember that the Commission's proposed rule has the effect of restricting speech and thus must not run afoul of the First Amendment. As such, the Commission's rules must be "narrowly tailored to achieve the desired objective."²⁶ Here, the Commission should limit the scope of its rules, so as to maintain such "a 'fit' between the legislative ends and the means chosen to accomplish those ends,"²⁷ and thus avoid potential constitutional issues. The Commission must consider the value of survey research in the balancing of legislative means and ends; failure to account for the value of the speech that will be restricted also indicates lack of "fit." Furthermore, where there is no stated purpose for a proposed rule, as in this proceeding,²⁸ there is no "fit" to be obtained with an unspecified objective. The Commission should thus narrowly tailor its actions to ensure that they stay within constitutional bounds.

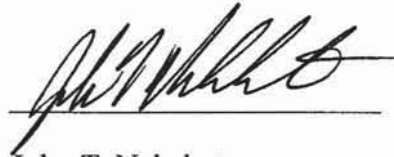
Accordingly, the Commission should not enact its proposed rule requiring a caller to obtain a person's signed written consent in order to use an autodialer to place a call to his or her cell phone. The record shows that the proposed rule would not further the Commission's goal of harmonizing its rules with those of the FTC. Moreover, the rule would impose serious costs on survey research without providing any real benefit to consumers.

²⁶ *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

²⁷ *Id.*

²⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 25 FCC Rcd 1501, 1510 ¶ 20 (2010) ("TCPA NPRM") (citing identical wording as the only purpose for extending the proposed rule to autodialers).

Respectfully submitted,



John T. Nakahata
Rachel W. Petty
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300

Timothy T. Smith
Executive Vice President & Chief Legal
Officer
Michelle N. Levister
Deputy General Counsel
ARBITRON INC.
9705 Patuxent Woods Dr
Columbia, MD 21046

Julie O'Neill
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Suite 6000
Washington, District of Columbia 20006-1888
(202) 887-8764

Counsel for Arbitron Inc.

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